Affirmed.

Submitted

16 October 1871

Dunn

Dunn

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~521~~ ~~179~~ 18

NOEL BYRON BOYDEN, DAVID WALTER JONES, CYRUS WOODMAN, JOHN J. ROSS, JOHN B. TERRY, OLIVER HOLSHOUSER AND MONTGOMERY M. COTHREN, PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

FILED DECEMBER 3, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 321.

NOEL BYRON BOYDEN, DAVID WALTER JONES, CYRUS WOODMAN, JOHN J. ROSS, JOHN B. TERRY, OLIVER HOLSHOUSER AND MONTGOMERY M. COTHREN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Præcipe for summons	1	1
Summons and return to same	2	1
Declaration	3	2
Præcipe for alias summons	7	4
Alias summons and return to same	8	4
Pleas	9	5
Replication	15	8
Trial and verdict	16	9
Judgment	17	9
Bill of exceptions	18	10
Bond for costs on writ of error	20	11
Clerk's certificate	23	12
Writ of error	24	13
Citation and return	25	13

1 Circuit Court of the United States of America, for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the Circuit Court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee in said district of Wisconsin, on the second Monday (being the thirteenth day of April, A. D. 1868.

Present the Honorable Andrew G. Miller, district judge, presiding; Cassius Fairchild, marshal; Edward Kurtz, clerk.

Among other the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA
vs.
NOEL BYRON BOYDEN, DAVID WALTER Jones, Cyrus Woodman, John J. Ross, John B. Terry, Oliver Holshouser and Montgomery M. Cothren. } At law.

Be it remembered that heretofore, to wit, on the thirteenth day of October, A. D. 1862, came the United States district attorney, Mr. Cogswell, and filed his præcipe for a summons against the above-named defendants, as follows:

Circuit Court of the United States of America for the district of Wisconsin.

Præcipe for summons.

THE UNITED STATES OF AMERICA
vs.
NOEL BYRON BOYDEN, DAVID WALTER Jones, Cyrus Woodman, John J. Ross, John B. Terry, Oliver Holshouser and Montgomery M. Cothren.

Issue a summons in the above-entitled cause of a plea of debt to the plaintiffs, damage ten thousand dollars, returnable the first Monday of December next ensuing.

J. B. D. COGSWELL,
U. S. District Attorney.

To J. M. Miller, esq., clerk.

Whereupon a summons issued, as follows:

2 THE UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America, to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon Noel Byron Boyden, David Walter Jones, Cyrus Woodman, John J. Ross, John B. Terry, Oliver

Holshouser and Montgomery M. Cothren to appear before the Circuit Court of the United States of America for the district of Wisconsin, in the eighth circuit, at the United States court-room in the city of Milwaukee, on the first Monday of December ensuing, then and there to answer unto the United States of America, in a plea of debt to their damage ten thousand dollars, which shall then and there be made to appear, and of this writ make due return.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this thirteenth day of October, in the year of our Lord one thousand eight hundred and sixty-two and of the independence of the United States the eighty-seventh.

[SEAL.]

J. B. D. COGSWELL,
U. S Dist. Attorney.

J. M. MILLER, *Clerk.*

Return to summons.

Summons returned: "Served on the within-named Noel Byron Boyden, by showing him this summons and delivering him a copy thereof, this 13th day of November, 1862.

DARIUS C. JACKSON,
U. S. Marshal.
By T. W. MARTIN, *Dep'ty.*

Fees $20 20.

DECEMBER 1, 1862.

This day came the district attorney and filed his declaration, as follows:

3 Circuit Court of the United States for the Wisconsin district.

Declaration.

Of the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-two.

The United States of America, plaintiff in this suit, by John B. D. Cogswell, attorney of the United States for the district of Wisconsin, complain of Noel Byron Boyden, David Walter Jones, Cyrus Woodman, John J. Ross, John B. Terry, Oliver Holshouser, Montgomery M. Cothren, defendants in this suit, of a plea that the said defendants render unto the said plaintiffs the sum of five thousand and eighty-eight 16-100 dollars, ($5,088 16-100,) lawful money of the said United States, which the said defendants to the said plaintiffs owe, and from them unjustly detain.

For that whereas the said defendants heretofore, to wit, on the first day of June, one thousand eight hundred and fifty eight, in the county of Iowa, in the State of Wisconsin, to wit, within the jurisdiction of this court, in the district aforesaid, made their certain bond

or writing obligatory, bearing date the day and year last aforesaid, sealed with the seals of the said defendants, and delivered to the said plaintiffs, and which said bond or writing obligatory the
4 said plaintiffs now here bring unto this court, and show to the said court that the said defendants became held and firmly bound unto the said plaintiffs in the sum of fifty thousand dollars, ($50,000,) for the payment whereof the said defendants did bind themselves, their heirs, executors and administrators, jointly and severally by these presents.

And the said plaintiffs further say, that the said bond or writing obligatory was and is subject to certain conditions thereunder written, to the effect following, that is to say: that whereas, the above-bounden Noel Byron Boyden had theretofore been appointed by the President of the United States, pursuant to law, receiver of public moneys for the district of lands subject to sale at Eau Claire in the State of Wisconsin, for the term of four years from the sixth day of May, 1858, by commission bearing date the seventh day of May, 1858; if, therefore, the said Noel Byron Boyden had truly and faithfully executed and discharged, and should continue truly and faithfully to execute and discharge all the duties of said office, according to law, then the above obligation should be void and of no effect, otherwise should abide and remain in full force and virtue.

5 And the said plaintiffs aver as a breach of the conditions of the said bond or writing obligatory, that after the making and delivery of the same to the plaintiffs, and after the appointment of the said Noel Byron Boyden to be receiver of public moneys as aforesaid, and before the commencement of this suit, and while and during the time that the said Noel Byron Boyden was receiver as aforesaid, that he, the said Noel Byron Boyden, did not truly and faithfully execute and discharge the duties of said office according to law, but therein failed and made default in this, to wit, that there came into, and was then and there, to wit, at Eau Claire aforesaid, in the said district, in the hands of him, the said Noel Byron Boyden, receiver as aforesaid, a large sum of money, to wit, the sum of five thousand and eighty-eight 16-100 dollars, ($5,088 16,) received by him by virtue of his said office, and being the money of the said United States, which it was the duty of him, the said Noel Byron Boyden as such receiver, by the conditions of the said bond or writing obligatory and by law, to pay to and account for, with the said plaintiffs, as required by law; yet the said Noel Byron Boyden hath not and would not pay over and account to the said plaintiffs for the said moneys belonging to the said plaintiffs as aforesaid, nor
6 any part thereof, although often requested so to do; but that he, the said Noel Byron Boyden, has hitherto wholly neglected and refused, and still does neglect and refuse so to do, to the damage of the said plaintiffs of ten thousand dollars, whereby an action hath accrued to the said plaintiffs against the said defendants to have of and from the said defendants the sum of five thousand and eighty-eight 16-100 dollars and the damages aforesaid, and therefore the plaintiffs bring suit.

JOHN B. D. COGSWELL, *U. S. Att'y, Wis. District.*

And same day, came the said district attorney and entered in the order and rule book a rule to plead, as follows, to wit:

Of the first Monday of December, A. D. 1862.

Rule to plead.

THE UNITED STATES OF AMERICA
vs.
NOEL BYRON BOYDEN, DAVID WALTER JONES, CYRUS WOODMAN, JOHN J. ROSS, JOHN B. TERRY, OLIVER HOLSHOUSER and MONTGOMERY M. COTHREN.

On motion of John B. D. Cogswell, U. S. district attorney, it is ordered that the defendants plead to the plaintiff's declaration
7 on file, by the first Monday of January next, or their default will be entered.

JOHN B. D. COGSWELL,
U. S. Dist. Attorney, Wis.

DECEMBER 11, 1862.

This day came the district attorney and filed his præcipe for an alias summons, as follows:

Circuit Court of the United States of America for the district of Wisconsin.

Præcipe for alias summons.

UNITED STATES OF AMERICA
vs.
NOEL BYRON BOYDEN *et al.*

Issue an alias summons in the above-entitled cause of a plea of debt to the plaintiff's damage ten thousand dollars, returnable the first Monday of January next ensuing.

Dated Dec. 11, 1862.

JOHN B. D. COGSWELL,
U. S. Dist. Attorney.

To W. J. M. Miller, esq., clerk.

Whereupon an alias summons issued, as follows:

8 THE UNITED STATES OF AMERICA,
District of Wisconsin, ss.

The President of the United States of America, to the marshal of the district of Wisconsin, greeting:

You are hereby commanded, as heretofore commanded, to summon Noel Byron Boyden, David Walter Jones, Cyrus Woodman, John J. Ross, John B. Terry, Oliver Holshouser and Montgomery M. Cothren to appear before the Circuit Court of the United States of Amer-

ica for the district of Wisconsin, in the eighth circuit, at the United States court-room, in the city of Milwaukee, on the first Monday of January ensuing, then and there to answer unto the United States of America, in a plea of debt to their damage ten thousand dollars, which shall then and there be made to appear; and of this writ make due return.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this eleventh day of December, in the year of our Lord one thousand eight hundred and sixty-two and of the independence of the United States the eighty-seventh.

SEAL.] J. B. D. COGSWELL,
U. S. Dist. Attorney.

J. M. MILLER, *Clerk.*

Return to alias summons.

Alias summons returned: "Served upon the within-named David Walter Jones, John J. Ross, John B. Terry and Montgomery M. Cothren by showing them this summons, and delivering to each of them a copy thereof; and served upon the within-named Cyrus Woodman and Oliver Holshouser, by leaving a copy of this summons at each of their usual places of abode, (they not being found,) with each of their wives, and informed each of them of the contents thereof, this 20th day of December, A. D. 1862.

Fees $24 26.

D. C. JACKSON, *Marshal.*
By O. M. DERING, *Deputy.*

JANUARY 3, 1865.

This day came the parties by their counsel, and by consent it is ordered by the court that this cause be and the same hereby is continued.

JULY 28, 1865.

This day came the defendants by Messrs. Dunn & Reed, and H. L. Palmer, their attorneys, and filed their pleas and notice, as follows:

9 United States Circuit Court for the district of Wisconsin.

Pleas.

NOEL BYRON BOYDEN, DAVID WALTER JONES, Cyrus Woodman, John J. Ross, John B. Terry, Oliver Holshouser and Montgomery M. Cothren,
ads.
THE UNITED STATES OF AMERICA.

And now comes the said defendants by Dunn & Read and H. L. Palmer their attorneys, and defend the wrong and injury, when, &c., and

say that the said supposed bond or writing obligatory, is not their deed, and of this the said defendants put themselves upon the country, and the said plaintiff doth the like, &c.; and for a further plea in this behalf the said defendants, by leave of the court for that purpose first had and obtained, according to the statute in such case made and provided, say that the said United States of America ought not to have or maintain its aforesaid action thereof against them because they say that he, the said Noel Byron Boyden, did, from time to time, and at [at] all times after the making of the said writing obligatory, and the said condition thereof, well and truly observe, perform, fulfill and keep all and singular the articles, clauses, payments, conditions and agreements in the said condition of the said writing obligatory specified, comprised and mentioned in all things therein contained, on his part and behalf, to be observed, performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the
10 said condition of the said writing obligatory.

And this they, the said defendants, are ready to verify, wherefore they pray judgment if the said United States of America ought to have or maintain its aforesaid action thereof against them.

And for a further plea in this behalf, the said defendants, by leave of the court for this purpose first had and obtained, according to the statute in such case made and provided, say, that the said United States of America ought not to have or maintain its aforesaid action thereof against them, because they say that the said Noel Byron Boyden did at all times from the sixth day of May, A. D. 1858, and at all times thereafter during the continuance of his office of receiver of public monies for the district of lands subject to sale at Eau Claire, in the State of Wisconsin, truly and faithfully execute and discharge all of the duties of the said office accoring to law, and that on the twenty-third day of December, A. D. 1859, while being so engaged in the faithful, true and honest execution and discharge of his duty as such receiver of public monies, was invaded and beset by some person or persons unknown, and was violently robbed of the sum of five thousand eighty-eight dollars and sixteen cents, being then and there the money belonging to the said United States of America, received by the said Noel Byron Boyden and held in trust by him for the said United States of America as receiver of public monies for the district of lands subject to sale at Eau Claire in the State of Wisconsin; and that the said sum of money is the identical sum of
11 money mentioned in the said plaintiff's declaration herein, and this, the said defendants are ready to verify; wherefore, they pray judgment if the said United States of America ought to have or maintain its aforesaid action thereof against them.

Dated Mineral Point, Wis., Jan. 31st, 1863.

DUNN & READ & H. L. PALMER,
Att'ys for Def't's.

SIR: Please take notice that the said defendants at the trial of the above-entitled cause will insist upon and give in evidence under the general issue above pleaded, that the said defendant, Noel Byron

Boyden, did, at all times during his continuance in office as such receiver as aforesaid, faithfully execute and discharge all the duties of the said office according to law, and did in due and proper time and from time to time account for and pay over to the said plaintiff and its proper officers, as required by law, all and singular all the monies which came to his hand as such receiver, belonging to the said plaintiff or which it was his duty to account for or pay over to the said plaintiff according to law, or his duty as such receiver, except only the sum of five thousand and eighty-eight 16–100 dollars, being the same identical money mentioned and demanded in the declaration in this action; that the said sum was in the safe belonging to and provided by the said plaintiff in and for the office of the receiver of public monies for the district of lands subject to sale at Eau Claire in the State of Wisconsin, on the 23d day of December, A. D. 1859, which office was then and there occupied by the said defendant, Noel B. Boyden, and then remained and continued in the said safe un-
12 der the control and custody of the said defendant, Noel B. Boyden, until the same was forcibly wrested and stolen from the said safe and carried away as hereinafter set forth; that on the evening of the said 23d day of December, 1859, the said defendant Noel B. Boyden repaired to his said office for the transaction of business, and was then engaged in transacting business of said office; that he opened the safe and took out his disbursing account book and papers which he was examining and arranging preparatory to leaving within a day or two thereafter to go to Chicago to deposit the amount of money he then had on hand belonging to the said plaintiff, when at about 9 o'clock in the said evening, and while the said defendant, Noel B. Boyden, was so employed as aforesaid, he being seated outside the table counter with his back towards and within a few feet of the front door, a person or persons unknown, entered the front door of the office, quickly turned the key which was in the lock in the inside, instantly extinguished the light in the office and seized the said defendant, Noel B. Boyden, with one hand over his mouth, and held him firmly in the chair in which he was sitting, wrenched his mouth open and gagged him by cramming a handkerchief therein, attached a cord to his wrist, (he having but one arm) threw him with violence upon the floor, turned him upon his face, and firmly fastened his wrist, ankle and thigh together by means of cord which was passed several times around his body and
13 neck and across his mouth, and in that condition tied him with his face to the floor firmly to a large desk in the office; that the said person or persons then proceeded at once to the safe and robbed it of the said sum of money demanded in this action and took and carried the same away, leaving the said Noel B. Boyden in the condition above described; that said robbery was effected and accomplished by force which the said defendant, Noel B. Boyden, was powerless to resist, and was effected without the previous knowledge of the said defendant, Boyden, and without his concurrence, connivance or consent, and against his will; that he, the said defendant, Boyden, made all the resistance thereto and used all the efforts of

say that the said supposed bond or writing obligatory, is not their deed, and of this the said defendants put themselves upon the country, and the said plaintiff doth the like, &c.; and for a further plea in this behalf the said defendants, by leave of the court for that purpose first had and obtained, according to the statute in such case made and provided, say that the said United States of America ought not to have or maintain its aforesaid action thereof against them because they say that he, the said Noel Byron Boyden, did, from time to time, and at [at] all times after the making of the said writing obligatory, and the said condition thereof, well and truly observe, perform, fulfill and keep all and singular the articles, clauses, payments, conditions and agreements in the said condition of the said writing obligatory specified, comprised and mentioned in all things therein contained, on his part and behalf, to be observed, performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the
10 said condition of the said writing obligatory.

And this they, the said defendants, are ready to verify, wherefore they pray judgment if the said United States of America ought to have or maintain its aforesaid action thereof against them.

And for a further plea in this behalf, the said defendants, by leave of the court for this purpose first had and obtained, according to the statute in such case made and provided, say, that the said United States of America ought not to have or maintain its aforesaid action thereof against them, because they say that the said Noel Byron Boyden did at all times from the sixth day of May, A. D. 1858, and at all times thereafter during the continuance of his office of receiver of public monies for the district of lands subject to sale at Eau Claire, in the State of Wisconsin, truly and faithfully execute and discharge all of the duties of the said office accoring to law, and that on the twenty-third day of December, A. D. 1859, while being so engaged in the faithful, true and honest execution and discharge of his duty as such receiver of public monies, was invaded and beset by some person or persons unknown, and was violently robbed of the sum of five thousand eighty-eight dollars and sixteen cents, being then and there the money belonging to the said United States of America, received by the said Noel Byron Boyden and held in trust by him for the said United States of America as receiver of public monies for the district of lands subject to sale at Eau Claire in the State of Wisconsin; and that the said sum of money is the identical sum of
11 money mentioned in the said plaintiff's declaration herein, and this, the said defendants are ready to verify; wherefore, they pray judgment if the said United States of America ought to have or maintain its aforesaid action thereof against them.

Dated Mineral Point, Wis., Jan. 31st, 1863.

DUNN & READ & H. L. PALMER,
Att'ys for Def't's.

SIR: Please take notice that the said defendants at the trial of the above-entitled cause will insist upon and give in evidence under the general issue above pleaded, that the said defendant, Noel Byron

Boyden, did, at all times during his continuance in office as such receiver as aforesaid, faithfully execute and discharge all the duties of the said office according to law, and did in due and proper time and from time to time account for and pay over to the said plaintiff and its proper officers, as required by law, all and singular all the monies which came to his hand as such receiver, belonging to the said plaintiff or which it was his duty to account for or pay over to the said plaintiff according to law, or his duty as such receiver, except only the sum of five thousand and eighty-eight 16–100 dollars, being the same identical money mentioned and demanded in the declaration in this action; that the said sum was in the safe belonging to and provided by the said plaintiff in and for the office of the receiver of public monies for the district of lands subject to sale at Eau Claire in the State of Wisconsin, on the 23d day of December, A. D. 1859, which office was then and there occupied by the said defendant, Noel B. Boyden, and then remained and continued in the said safe under the control and custody of the said defendant, Noel B.

12

Boyden, until the same was forcibly wrested and stolen from the said safe and carried away as hereinafter set forth; that on the evening of the said 23d day of December, 1859, the said defendant Noel B. Boyden repaired to his said office for the transaction of business, and was then engaged in transacting business of said office; that he opened the safe and took out his disbursing account book and papers which he was examining and arranging preparatory to leaving within a day or two thereafter to go to Chicago to deposit the amount of money he then had on hand belonging to the said plaintiff, when at about 9 o'clock in the said evening, and while the said defendant, Noel B. Boyden, was so employed as aforesaid, he being seated outside the table counter with his back towards and within a few feet of the front door, a person or persons unknown, entered the front door of the office, quickly turned the key which was in the lock in the inside, instantly extinguished the light in the office and seized the said defendant, Noel B. Boyden, with one hand over his mouth, and held him firmly in the chair in which he was sitting, wrenched his mouth open and gagged him by cramming a handkerchief therein, attached a cord to his wrist, (he having but one arm) threw him with violence upon the floor, turned him upon his face, and firmly fastened his wrist, ankle and thigh together by means of cord which was passed several times around his body and neck and across his mouth, and in that condition tied him with

13

his face to the floor firmly to a large desk in the office; that the said person or persons then proceeded at once to the safe and robbed it of the said sum of money demanded in this action and took and carried the same away, leaving the said Noel B. Boyden in the condition above described; that said robbery was effected and accomplished by force which the said defendant, Noel B. Boyden, was powerless to resist, and was effected without the previous knowledge of the said defendant, Boyden, and without his concurrence, connivance or consent, and against his will; that he, the said defendant, Boyden, made all the resistance thereto and used all the efforts of

which he was capable, to protect the said money and other property of the said plaintiff and his own person, and that in such resistance and efforts be received severe injuries to his face, side and other parts of his person.

Dated Mineral Point, Jan. 31st, 1863.

DUNN & READ & H. L. PALMER,
Def't's Att'ys.

I certify that in my opinion the foregoing special pleas are, and that each of them is, well founded.

H. L. PALMER,
One of Att'ys for Def't.

14 JANUARY 3, 1866.

This day ordered by the court that this cause be, and the same hereby is, continued.

SEPTEMBER 21, 1866.

This day came the parties by their counsel, and on motion of the defendants it is ordered by the court that this cause be, and the same hereby is, continued.

APRIL 11, 1867.

This day came the parties by their counsel, and, on motion of the defendant's counsel, it is ordered by the court that this cause be, and the same is, continued, and that the same shall be peremptorily set down for trial at the next September term of this court.

APRIL 21, 1868.

This day came the district attorney and filed his replication as follows, to wit:

15 United States Circuit Court for the district of Wisconsin.

Replication.

THE UNITED STATES OF AMERICA
vs.
NOEL BYRON BOYDEN, DAVID WALTER JONES, CYRUS WOODMAN, JOHN J. ROSS, JOHN B. TERRY, OLIVER HOLSHOUSER and MONTGOMERY M. COTHREN.

And the said plaintiff as to the said pleas of the said defendants, secondly and thirdly above pleaded, saith, that the said plaintiff by reason of anything by the said defendants in the said pleas alleged, ought not to be barred from having and maintaining the aforesaid action against the said defendants, because the plaintiff saith that

heretofore, to wit, before the commencement of this suit, to wit, at the district of Wisconsin aforesaid, the sum of five thousand eighty-eight dollars and sixteen cents of the plaintiff's money was then and there received by him, the said Noel Byron Boyden, by virtue of his said office of receiver as aforesaid, and that he, the said Noel Byron Boyden, did not and has not paid the said sum of money, or
16 any part thereof, over to the said plaintiff as required by law, and this the said plaintiff prays may be inquired of by the country, &c.

THOMAS HOOD,
U. S. Att'y Dist. Wis.

And now, at this same term, to wit, April term, A. D. 1868, and on the 25th day thereof, to wit, on the sixth day of June, A. D. 1868, the following proceedings were had, to wit:

Trial and verdict.

THE UNITED STATES OF AMERICA *vs.* NOEL BYRON BOYDEN, DAVID WALTER JONES, CYRUS WOODMAN, JOHN J. ROSS, JOHN B. TERRY, OLIVER HOLSHOUSER and MONTGOMERY M. COTHREN.	At law.

This day came the district attorney, and the defendants, by their counsel, M. Cothren, and the issues herein came on to be tried, whereupon a jury was called to try the same, who came, to wit, John Fowle, Moses S. Scott, Peter Wheelock, Joseph M. Alcott, A. C. Leland, Peter Martineau, George W. Clason, Frederick Wardner, George Bowman, George S. Redington, Levi Morse and Charles H. Hurd, twelve free, honest and lawful men of the district, who
17 were severally sworn and empanneled. And the jurors of the jury aforesaid being charged by the court on their said oaths respectively, do say that they find that the bond declared on is the deed of the defendants, and that the conditions thereof are broken in manner and form as charged, and do further find for the plaintiff the other issues herein, and that the defendants do owe, and are indebted to the United States, plaintiff, fifty thousand dollars debt, the penalty of the bond declared on, and assess the damages to the said plaintiff at seven thousand one hundred and thirteen dollars and twenty-four cents.

And afterwards, to wit, on the 26th day of said term, to wit, on the eighth day of June, A. D. 1868, the following proceedings were had, to wit:

Judgment.

THE UNITED STATES OF AMERICA
vs.
NOEL BYRON BOYDEN, DAVID WALTER JONES, CYRUS WOODMAN, JOHN J. ROSS, JOHN B. TERRY, OLIVER HOLSHOUSER AND MONTGOMERY M. COTHREN. } At law.

This day came the district attorney, and on his motion it is considered and adjudged by this court now here, that the United
18 States of America do have and recover of the defendants, Noel Byron Boyden, David Walter Jones, Cyrus Woodman, John J. Ross, John B. Terry, Oliver Holshouser and Montgomery M. Cothren, fifty thousand dollars, debt, so found by the jury, with costs; and that they have execution for seven thousand one hundred and thirteen dollars and twenty-four cents, the damages so assessed by the jury, together with eighty dollars and one cent, their costs about their said suit in this behalf by them expended.

Judgment roll signed June 8th, A. D. 1868.
EDWARD KURTZ, *Clerk.*

Damages	$7,113 24
Costs	80 01
	$7,193 25

Judgment roll filed June 8th, A. D. 1868, at five o'clock, p. m.
EDWARD KURTZ, *Clerk.*

And, same day, bill of exceptions signed and filed as follows, to wit:

Circuit Court of the United States in and for the district of Wisconsin.

Bill of exceptions.

THE UNITED STATES OF AMERICA
vs.
N. B. BOYDEN AND OTHERS.

19 These defendants, upon the trial of this cause for defense, offered to prove that on the 23d day of December, A. D. 1859, at the village of Eau Claire, in the State of Wisconsin, while in the land office of the United States for that land district, the said N. B. Boyden, then and there being the receiver of public monies for said district, and then and there being in the discharge of the duties of his office as such receiver, was suddenly beset by some person or per-

sons to him unknown, and thrown down, and against all defense that he could make, was gagged and bound, and the monies described in the complaint violently, and without his fault, taken from him and carried away, which said moneys had been by him received for the sales of public lands, and were then in his possession as such receiver in the proper discharge of the duties of his office; to the introduction of which said evidence the district attorney objected, upon the ground that the said facts as offered to be proved constitutes no defense, which objection the court sustained, and thereupon the said defendants by their counsel did then and there except. And
20 the said matter not appearing of record, the judge of said court has hereunto set his hand and seal this 8th day of June, A. D. 1868.

[SEAL.] A. G. MILLER.

JULY 6, 1868.

This day came D. W. Jones, John B. Terry, John J. Ross, M. M. Cothren, R. D. Pulford and William H. Curry, and filed their bond in the penalty of two hundred and fifty dollars, conditioned that the defendants shall prosecute a writ of error to effect, and pay all costs that shall be awarded against them if they shall fail to make good their plea, which bond is approved, and is as follows, to wit:

Circuit Court of the United States for the district of Wisconsin.

Bond for costs on writ of error.

THE UNITED STATES OF AMERICA
vs.
NOEL BYRON BOYDEN, DAVID WALTER JONES, CYRUS WOODMAN, JOHN J. ROSS, JOHN B. TERRY, OLIVER HOLSHOUSER, MONTGOMERY M. COTHREN.

Know all men by these presents, that we, D. W. Jones, Cyrus Woodman, John J. Ross, J. B. Terry, M. M. Cothren, as principals, and R. D. Pulford and W. H. Curry, as sureties, are held and firmly bound unto the United States of America in the penal
21 sum of two hundred and fifty dollars, good and lawful money of the United States, to the payment of which well and truly to be made, we, and each of us, bind ourselves, our, and each of our heirs, executors and administrators, firmly by these presents.

Witness our hands and seals this third day of July, A. D. 1868.

The conditions of this obligation are such that whereas on the 8th day of June, A. D. 1868, in the Circuit Court of the United States for the district of Wisconsin, a judgment was rendered against N. B. Boyden, D. W. Jones, Cyrus Woodman, John J. Ross, John B. Terry,

Oliver Holshouser and Montgomery M. Cothren, for the sum of seven thousand one hundred and thirteen dollars and twenty-four cents debt, and eighty dollars and one cent for costs, in favor of the United States of America, in the suit at the head of this bond entitled. And whereas the defendants in said cause have prayed for, obtained and sued out a writ of error to the Supreme Court of the United States in said cause: Now if the said defendants in said cause shall well and truly prosecute said writ of error to final effect, and pay all costs that shall be awarded against him in said cause, then this obligation to be void, otherwise to be and remain in full force and effect.

[SEAL.]	D. W. JONES.
[SEAL.]	JOHN B. TERRY.
[SEAL.]	JOHN J. ROSS.
[SEAL.]	M. M. COTHREN.
[SEAL.]	R. D. PULFORD.
[SEAL.]	WILLIAM H. CURRY.

STATE OF WISCONSIN, *Iowa County, ss:*

D. W. Jones, John B. Terry, John J. Ross, M. M. Cothren, and R. D. Pulford and William H. Curry, each being duly sworn, on oath deposes and says, that he is worth the sum of five hundred dollars over and above expenses and liabilities.

Subscribed and sworn to before me this 2d day of July, A. D. 1868.

[SEAL.] CYRUS LANYON,
Notary Public for Wisconsin, residing in Iowa County.

JULY 6, 1868.

Approved by the court:

A. G. MILLER.

Whereupon a writ of error and citation issued, and copy of writ of error lodged for defendant in error.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit of the United States against Noel Byron Boyden et al.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said district of Wisconsin this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the said United States the ninety-third.

[SEAL.] EDWARD KURTZ, *Clerk.*

24 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the Circuit Court of the United States of America, for the district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said Circuit Court of the United States of America for the district of Wisconsin before you, between The United States of America, plaintiff, and Noel Byron Boyden, David Walter Jones, Cyrus Woodman, John J. Ross, John B. Terry, Oliver Holshouser and Montgomery M. Cothren, defendants, as manifest error hath happened to the damage of the said Noel Byron Boyden, David Walter Jones, Cyrus Woodman, John J. Ross, John B. Terry, Oliver Holshouser and Montgomery M. Cothren, as by the complaint appears, and it being fit that the error, if any there hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. You are hereby commanded, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-third.

[SEAL.] EDWARD KURTZ, *Clerk.*

25 THE UNITED STATES OF AMERICA:

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States of America for the district of Wisconsin, wherein Noel Byron Boyden, David Walter Jones, Cyrus Woodman, John J. Ross, John B. Terry, Oliver Holshouser and Montgomery M. Cothren are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase Chief Justice of the said Supreme Court of the United States this sixth day of July, in the

year of our Lord one thousand eight hundred and sixty-eight, and of our independence the 93rd.

[SEAL.]

A. G. MILLER,
District Judge.

I accept service of above citation, August 27th, 1868.

THOMAS HORD,
U. S. Att'y Dist. Wis.

Supreme Court
OF THE UNITED STATES.

Error to the Circuit Court of the United States for the District of Wisconsin.

M. M. COTHREN,
Attorney for Defendants.

MATT. H. CARPENTER,
Of Counsel.

'OEL BYRQN BOYDEN, *et al.*
vs.
'E UNITED STATES OF AM-
ERICA.

Supreme Court of the United States.

ERROR TO THE CIRCUIT COURT OF THE U. STATES FOR THE DISTRICT OF WISCONSIN.

NOEL BYRON BOYDEN, *et al*
vs.
THE UNITED STATES OF AMERICA,

The defense to the action in this case is, that the Defendant, N. B. Boyden, Receiver of the United States Land Office, at Eau Clare, had been *robbed* of the moneys in his hands, which belonged to the Government, without any fault or negligence on his part.

The breach alleged in the declaration is, that he failed to pay to, and account for with Plaintiff, (the United States) the sum of $5,088.16 received by him by virtue of his office, and *being the money of the United States*, p. 3, fol. 5, of the printed case.

1

The defense interposed is by the sureties. They undertake that the said Boyden had "truly and faithfully executed and discharged, and should continue truly and faithfully to execute and discharge all the duties of said office," of Receiver, "according to law."

It is claimed by the defense that there is an undertaking upon the part of the Sureties for the capacity and fidelity of their principal, and not an insurance against loss by robbery, or the public enemy, wherein the principal is in no wise chargable with negligence,

The Sureties are Contractors with the Government. If they are
2 responsible at all, it is upon their express contract that their principal shall do his duty. Official as well as human duty, is measured by physical and mental possibility. Sureties do not undertake that an earthquake shall not swallow up the property of the Government; nor that the public enemy, or a robber shall not, dispite all resistance that can be made by the custodian, seize, and carry away the funds of the Government. Insurance Companies contract to pay losses; Sureties contract for such capacity and fidelity as man may possess, and as may be suitable for the employment of their principal.

At the common law, an officer was not responsible for loss of pub-
3 lic or private funds, except upon the ground of negligence or default; Lane *vs.* Cotton & Frankland, 1 Ld. Raymd. 646: Whitfield *vs* L. Despencer, Cowp. 754.

In the case of the Supervisors of the County of Albany *vs.* Dorr, *et al* 25 Wen. 440, it was held that a "public officer entrusted with the receipt and disbursement of public funds, is not responsible for money *stolen* from his office, where there is no imputation of negligence or other default on his part." Chief Justice Nelson, in giving the opinion, places emphasis upon the condition of the bond being for the faithful execution of the duties of his office, and says that this
4 condition recognizes the common law rule.

In Browning and others, *vs.* Hanford, 5, Hill, 589, the Supreme Court of N. Y. held that a Sheriff is not an insurer, and is only liable for negligence. The cases referred to in the opinions in this case,

show a general recognition of the same rule. The case of the Supervisors of Albany *vs.* Dorr, and others, was affirmed by the Court of Errors, in 1844. 7, Hill, 583.

In May, 1845, the case of Muzzy, *vs.* Shuttuck and others, was decided by the Supreme Court of N. Y., and the decision affirmed
5 by the Court of Errors in which it was held, that it was no defense to an action against a town Collector and his sureties, on the official bond, that the money had been stolen from the dwelling house of the principal, "without any fault, want of care or omission of duty on his part. 1, Denio, 223. But the decision in this case is placed solely upon the construction of the Statute, which was peculiar in its provisions, and in the opinion of the Court, rendered the Collector a *debtor* for the amount by him collected, and his sureties *guarantors for the payment of the debt.*

It does not conflict with the case of Supervisors of Albany *vs.*
6 Dorr, nor with the common law rule as to official liability; but only interprets and gives effect to a particular statute. It is, therefore, only authority for the construction of a similar statute.

The surety of an official bond is not bound beyond the terms of the bond.—U. States vs. Boyd, 15 Pet. 187.

The law of Congress prescribes the kind of bond to be given by a Receiver. The act of May 10th, 1800, 2d Stat. at Large, 75, Sec. 6, provides: "And the said receiver of public monies shall, before he enters upon the duties of his office, give bond with approved security, in the sum of ten thousand dollars for the faithful discharge of
7 his *trust.*"

The act of May 18th, 1796, 1 Statutes at Large, p 468, Sec. 12, provides: "And the person to be appointed to receive the money on sales in the western territory, before he shall receive any money under this act, shall give bond with sufficient surety for the faithful discharge of his *trust.*

The very terms of these statutes make the Receiver an agent, trustee, or bailee. Persons occupying such relations are only responsible for the same kind of negligence that bailees are liable for.

8 The general rule as stated by Story, is that "bailees in general are not responsible for losses resulting from inevitable accident or irresistible force". Story, on Bail, Sec. 25, 26. As to liability of a bailee, there is a distinction between loss by theft, and loss by robbery. In the latter sase—that of robbery, the legal definition of the term implies *irresistible* force, which relieves from responsibility.

The condition of the bond in question, substantially imposes the same, and no greater obligations and duties than if the language of the condition had been taken from the act of Congress. The undertaking was for the faithful discharge of the principal's *trust*. The

9 agreement of the sureties was, that there was sufficient capacity, and perfect fidelity to discharge the trust. They contracted for nothing more, and they ought to be held for nothing more than they contracted. It is the Government that is to protect the citizen against the public enemy, and the private robber; and not the citizen who is to protect the Government against losses by either. For a Government to hold the individual citizen responsible for its losses resulting from the irresistible force of anarchy, insurrection or robbery, would be to ignore the governmental impositions of the social compact; and impose burdens upon the individual citizen, which alone can find its apology in the logic of despotism.

10 When a Court adopts a principal as applicable to a particular case at variance with a long and well established line of decision, it finds its justification in some overpowering reason, which distinguishes it from all others.

The Supreme Court of N. Y. either found, or thought that they had found such reason for their decision, in the case of Muzzy, Su-

pervisor, *vs.* Shuttuck; 1 Denio, 233, in the peculiarity of a particular law.

The principal which seems to have governed in that case, is, that the special duties of the particular law under which the bond was
11 given, together with the general provisions of the law, constituted the principal a debtor of the funds and chargable taxes that came into his hands. To render the principal of that case at all applicable to this case, it would be necessary that the law of the United States, applicable to Receivers, should, in the opinion of this Court, render the Receiver a debtor to the Government for the sums that come into his hands; and the sureties obligors for the payment of the debt. In that case, the principal obligor would be taken out of the category of trustee or bailee, and would become the owner of the moneys which might come into his hands, and a mere debtor for mon-
12 eys had and recieved. If this were so, he could not be guilty of embezzlement. The penal portion of the Treasury Acts would not apply to him, because one cannot embezzle his own money, and the anomalous position would be assumed, of binding one by the provisions of a law in direct antagonism with the terms and conditions of his contract.

It however may not be inappropriate to examine such of the laws as apply to the duties of a Receiver, with a view of ascertaining whether an undertaking for, and a true and faithful execution and discharge of all of the duties of the office " render the sureties *insurers* of
13 the Government against loss by robbery.

The act of Aug. 6, 1846, called the independent treasury act, sec. 6, 9 Statute at large, p. 59, provides that all Receivers of public moneys at the several land Offices " be, and they are hereby required to keep safely, without using, loaning, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money

collected by them, or otherwise at any time placed in their possession and custody till the same is ordered by the proper department or officer of the Government to be transferred or paid out; and when such orders for transfer or payment are recieved, faithfully and
14 promptly to make the same, as directed, and to do and perform all other duties as *fiscal agents* of the Government which may be imposed by this or any other act of Congress, or by any regulation of the Treasury Department, made in conformity to law."

By the act of March 3d, 1857, 11 Stat., 249, sec. 3, a failure to deposit with the Treasurer of the United States any moneys of the United States, or to properly pay over any such moneys when required by the proper officer, is declared to be embezzlement.

In every act of Congress, Receivers are spoken of and regarded as public agents, and depositaries. Nowhere do they seem to be re-
15 garded as insurers against inevitable accident or irresistible force, or as debtors merely of the Government.

Public policy requires that public officers should be held to great strictness in the discharge of public duties. But one fundamental principle upon which public policy is based, is a fair and honest interpretation of, and strict adherence to the terms of all contracts. The very end and object of true public policy is to secure honesty and justice. Our Government is founded in justice. It can no better afford to deprive one of its citizens of his just rights, than it can afford, unnecessarily to surrender any of its own just rights. To hold that
16 the sureties in this case by undertaking *that Noel Byron Boyden should truly and faithfully execute and discharge all the duties of the office of Receiver of the land office at Eau Clare, according to law*, thereby undertook to repay to the general Government any money that might be taken from the land office by irresistible force, would be to hold them outside of their contract responsible for that which they

never either expressly, or by implication agreed to do. It is a principle that every man is presumed to know the law. The Sureties in this case were presumed to know the law. They knew what the duties of a Receiver were under the law. One of those duties was
17 to *safely keep* the funds of the Government. The very term *safely keep*, implies ability to do the thing undertaken to be done, when applied to one who holds an office. But if by the power of Omnipotence, or by the irresistible force of man, the ability is destroyed, the duty ceases. Duty implies possible ability to do; Array duty against Omnipotence or impossibility, and duty ceases.

The Sureties in this case are presumed to have known what the Court had decided in the case of the United States *vs.* Prescott *et al*, 3, How. 587. But they are also presumed to have known that that case might have been, and probably was, decided upon the conditions of the bond, which greatly enlarged the obligations of the con-
18 tractors above and beyond the contract in this case.

In that case the Sureties had undertaken in addition to the common law obligation of Sureties upon an official bond, that the principal "has well, truly and faithfully, and shall well, truly and faithfully keep safely, without loaning or using all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same has been or shall be ordered by the proper department or officer of the Government, to be transferred or paid out. And when such orders for transfer or payment has been, or shall be received, has faithfully and promptly made, and will faithfully and
19 promptly make the same as directed."

This may well have been considered a contract to pay money. It may well have been considered a contract of insurance with the Government, that all moneys which might come into the hands of the principal should be paid in the manner stipulated.

That case can only be regarded as decisive of itself, and similar cases. It does not seek to overturn any old nor to establish any new rule. It simply is a decision of the case by construction of the contract presented. But however that case may be regarded, the rule was only applied to a case of theft. The defense in this case is
20 quite different. It is robbery. Whether actual robbery could have been proved is not the question. The Court certainly erred in refusing to permit the Defendants to prove a loss for which none of the Defendants were at fault, and against which the most extreme vigilance could not have guarded.

A new land office is created in a remote backwoods country. A Receiver is appointed. The Government officials charged with that duty send the appointee the form of bond that he is to execute. A different form of bond may be required if the heads of the Department in their discretion require it. The law only requires it to
21 be for the *faithful discharge of his trust.* The Department requires in the given case, that the form of the bond shall be for the true and faithful execution and discharge of all of the duties of said office. The Sureties in executing the bond see and know that they are not insuring against inevitable casuality, or irresistible force. They agree that the principal shall perform every duty imposed by law while the party is engaged in the performance of his duty. Without any fault of his, and despite all that he or any other in his position could do, the thing relating to which it was undertaken that he should perform duties, is by irresistible power swept away. To
22 hold the Sureties responsible for the thing lost or destroyed under such a state of facts would be to hold them liable for what they might have bound themselves by contract to do instead of giving them the benefit of the things for which they did obligate themselves.

If the defense set up had been that the property was stolen, the rule in the case of Prescott and others would have properly applied,

because it may well be said that when the *utmost vigilance* is exercised, theft cannot take place. Public policy may require such vigilance upon the part of public officers as that theft can never occur. This, upon principle would render theft no defense. Not so with rob-

23 bery. That is a crime against which the utmost vigilance cannot guard. If the guardian be strong, the robber may be stronger. If Government cannot so administer law as that its own property will be safe from the bandit, it ought to sustain its own losses, unless the citizen has contracted to make them good.

Again, the declaration in this case does not state any cause of action. The act of Aug 6th 1846, 9, stat. 59, sec. 6, requires all receivers of public moneys to keep in their possession all of the moneys by them received, until the same is ordered by the proper department or officer of the Government to be transferred or paid out.

24 The amendatory act, March 3d 1857, 11 stat., 249, sec. 3, requires persons having moneys of the United States in their hands, to pay them to the Treasurer, the Assistant Treasurer, or public depositary of the United States, when required by the Secretary of the Treasury, or any other department. From these acts it is quite obvious, that until some order is made by the head of the proper department, no cause of action accrues against a Receiver. The declaration does not state that any order or requisition was ever made upon N. B. Boyden to transfer or pay over. This being so, there is a judgment without anything to base it upon as it appears to us.

25 We think the judgment should be reversed for two reasons.

First. That the Court erred in refusing to allow the Defendants to introduce any evidence to establish the facts by them offered to be proved.

Second. Because the declaration does not contain averments which constitute any cause of action.

The case of the United States *vs* Morgan *et al* 11 How, 154, was an action upon an official bond, the condition of which seems to have been for the *faithful performance* of official duty.

26 The Court held that it was a violation of official duty to receive any money not genuine. They further held, that it was negligence to receive altered treasury notes that had been taken feloniously from the office of the principal and altered and then paid back to him; and this seems to have been because the principal was required to keep a register of all treasury notes received, and from whom taken. The Court further held in the same case that if there was any bailment in the case, (p. 162) it was like that of a common carrier, who is liable for losses even by robbery. But in the case at bar we respectfully submit that an entirely different question is involved, viz: the question of the liability of a surety as *weighed and measured by his* **27** *contract.*

The case of the United States *vs* Dashiel, 4th Wallace 182, involved the question of liability for loss by stealing, and in principal is in no way distinguishable as we think from the case, of "the United States *vs* Prescott *et al*, which we have above discussed.

In the case of The State *ex rel, vs* Guard and others, 6, Black, f. 519, the Supreme Court of Indiana hold that when an officer is rendered incapable of discharging the duties of his office in consequence of sickness, his sureties are not liable. In the case now under consideration, there can be but little if any difference in the principle in **28** the case of Boyden having been robbed by overpowering force, and his having been shot down by the hand of an assassin, and then the undefended property of the government taken by the robber.

In the case of Farrer & Brown, *vs.* the United States, 5 Peters, Mr. Justice Johnson says for *the Court*, that if money is still in the

hands of a public officer, or substantially that *while* money is in the hands of a public officer, he, the officer, is a *bailee* to the government.

In the case of Abram Meyers, *vs* the United States, 1, McLean, R. 495, the Court uses the following language:

"The obligation of a surety is a matter of strict law, and never
29 can arise from implication. The bond must speak for itself, and its language can never be extended or altered to the injury of the surety."

The suretics in the case now before the Court, offered to prove a strict compliance with the condition of their bond and were by the Circuit Court cut off from all defense.

M. M. COTHREN,
Attorney for Defts.

MATT. H. CARPENTER,
Of Counsel.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

NOEL BYRON BOYDEN, *et al.*, *Plaintiffs in Error.*
vs.
THE UNITED STATES OF AMERICA, *Defendant in Error.*
} No. 119.

In error to the Circuit Court of the United States for the District of Wisconsin.

BRIEF OF THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

NOEL BYRON BOYDEN, *et al.*, *Plaintiffs in Error.*
vs.
THE UNITED STATES OF AMERICA, *Defendant in Error.*
} No. 119.

In error to the Circuit Court of the United States for the District of Wisconsin.

BRIEF OF THE UNITED STATES.

This is a suit against Boyden and his sureties on his official bond as receiver of public moneys for the district of lands subject to sale at Eau Claire, in the State of Wisconsin. The bond was given pursuant to the sixth section of the act of May 10, 1800, (2 Stat., p. 75,) and has the condition that if the said Boyden has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of said office according to law, then the obligation shall be void. The breach alleged is, that said Boyden received as such receiver of the moneys of the United States the sum of $5,088 16, which he has

not paid over to the United States. The defendants plead, *first*, the general issue, *second*, performance of the conditions, *third*, that said Boyden was violently robbed of said sum of money; and then give notice that at the trial they will give in evidence that said Boyden, on the evening of the 23d of December, 1859, at Eau Claire, was robbed of said sum of money by force, and without his concurrence, connivance, or consent, and against his will, and that he made all the resistance and used all the efforts he could to protect himself and the money. The plaintiffs join issue on the first plea, and reply to the second and third, that Boyden received said money as receiver and has not paid it to the plaintiffs as required by law, on which, it seems, issues are joined. A trial is had before a jury, who find that the bond declared on was the deed of the defendants; that the conditions thereof were broken in the manner and form as charged; and do further find for the plaintiffs the other issues herein, and that the defendants do owe and are indebted to the United States, the plaintiffs, $50,000, the penalty of the bond declared on, and assess the damages to the said plaintiff at $7,113 24, which is, I suppose, the amount sued for with interest, and for this judgment is rendered

A bill of exceptions is signed, sealed, and allowed by the judge, (p. t., pp. 10 and 11.) It is in these words: "These defendants, upon the trial of this cause for defence, offered to prove that, on the 23d day of December, A. D. 1859, at the village of Eau Claire,

in the State of Wisconsin, while in the land office of the United States for that land district, the said N. B. Boyden, then and there being the receiver of public moneys for said district, and then and there being in the discharge of the duties of his office as such receiver, was suddenly beset by some person or persons to him unknown, and thrown down, and against all defence that he could make, was gagged and bound, and the moneys described in the complaint violently, and without his fault, taken from him and carried away, which said moneys had been by him received for the sales of public lands, and were then in his possession as such receiver in the proper discharge of the duties of his office. To the introduction of which said evidence the District Attorney objected. upon the ground that the said facts as offered to be proved constitute no defence, which objection the court sustained, and thereupon, the said defendants, by their counsel, did then and there except," for which alleged error the cause has been brought by writ of error to this court.

The ruling of the judge in the circuit court was plainly right.

U. S. *vs.* Orestes A. Keehler, *et al.*, S. C. U. S. Dec. T., 1869; U. S. *vs.* Dashiel, 4 Wall., 185; U. S. *vs.* Morgan, 11 How., 182; U. S. *vs* Prescott, 3 How., 588.

The doctrine of these cases is, that where a loss occasioned by *vis major* or irresistible force, or by larceny or robbery, or by accident or casualty, is not

within the condition of the bond of a public officer, they do not relieve him from the performance thereof, though such loss may have happened without any fault or negligence on his part. They therefore constitute no defence to an action on the bond.

E. R. HOAR,
Attorney General.
W. A. FIELD,
Assist. Attorney General.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

NOEL BYRON BOYDEN *et al.*
vs.
THE UNITED STATES. } No. 18.

Additional Brief for the United States.

The plea of the plaintiffs in error constituted no defence to the suit of the United States to recover the money which Boyden had covenanted to pay by his bond. It is a settled principle of law that an express contract to do a certain thing is not discharged by its becoming subsequently impossible to do it by unforeseen occurrences, no matter how much beyond the contractor's control they may be. This rule of law has been applied to many cases of as great seeming hardship as that of the plaintiffs in error.

3 Kent's Com., (6th ed.) 465, *et seq.*
Metcalf on Con., 213, and cases cited.
Dermott *vs.* Jones, 2 Wallace. 1.
The Harriman, 9 Wallace, 161–172.
Paradine *vs.* Jane, Aleyn, 26.

It has been applied by this and other Courts to the

cases of official bonds under circumstances undistinguishable in principle from the present.

United States *vs.* Prescott, 3 How., 578.
United States *vs.* Dashiell, 4 Wallace, 185.
United States *vs.* Keehler, 9 Wallace, 83–88.
Commonwealth *vs.* Comley, 3 Barr, 372.
State *vs.* Harper, 6 Ohio St. 607.

See, also, Additional Brief in cases of Halliburton and Bevans *vs.* United States.

A. T. AKERMAN,
Attorney General.

C. H. HILL,
Assistant Attorney General.